PUBLIC PROSECUTOR

v.

NG MONG KIA & 4 ORS.

HIGH COURT, KUCHING
DATO' HJ. ABDUL KADIR BIN SULAIMAN J.
[CRIMINAL APPEAL NO. KG 48 OF 1991]
12 MAY 1993

CRIMINAL LAW & PROCEDURE: Charge of gambling in a public area - Discharge of accused by Magistrate - Appeal against order of Magistrate - Whether prima facie case had been made out against the accused.

The accused were charged with gambling in a public place, an offence punishable under s. 7(2) of the Gambling Ordinance 1957 (the Ordinance). The accused admitted that they were playing 'See Goh Lak' and pleaded guilty to the charge. The trial Magistrate held that the prosecution had failed to establish a *prima facie* case and discharged the accused. The prosecution appealed against the discharge.

Held:

[1] In a case where an accused pleads guilty to a charge, the brief facts tendered by the prosecution constitute all the evidence that is available to the prosecution in support of its case. It is based upon these brief facts that the Court will have to make a decision one way or another at the end of the day, whether the accused is guilty or not guilty of the charge.

[2] The game of 'See Goh Lak' is not one forbidden if played in a gaming house not being a game specified in the First Schedule of the Ordinance, neither is it a game of mixed chance and skill or for money or moneys worth. As such the game so played by the five respondents was not gaming within the meaning of the Ordinance.

[3] Since the element of gaming had not been proved, the fact that the game was played in a public place did not contravene s. 7(2) of the Ordinance and the respondents could not be convicted on the charge notwithstanding the fact that they pleaded guilty to it and admitted to the brief facts tendered.

[Appeal dismissed].

Cases referred to:
Chu Chee Peng v. PP [1973] 2 MLJ 35 ***(refd)***
Haw Tua Tau v. PP [1981] 2 MLJ 49 PC / [1981] CLJ 123 ***(foll)***

Legislation referred to:
Criminal Procedure Code, ss. 173(c)(f)(g), 422
Gambling Ordinance 1957, ss. 7(2)
Gambling Ordinance 1957 (Cap 138) of Sarawak

For the appellant - Azhahari Kamal bin Ramli, DPP
Respondents appearing in person

JUDGMENT

Hj. Abdul Kadir bin Sulaiman J:
The five respondents were jointly charged as follows:

> That you, on 5 September 1991 at about 1610 hours were found gambling a game of 'See Goh Lak' in a public area, to wit, an open space in front of Min Min Cafe, Lot 396, No. 49, Lorong Blacksmith 2A, Jalan Blacksmith, Kuching in the State of Sarawak and you thereby committed an offence punishable under s. 7(2) of the Gambling Ordinance 1957.

To the charge all the 5 respondents pleaded guilty. The brief facts of the case exhibited as P1 were then read and explained to them, which they admitted. The prosecution then tendered one porcelain bowl marked as P2 and three die marked as P3. The learned Magistrate before whom they were charged dismissed the charge and released all the 5 respondents unconditionally on the ground that the game 'See Goh Lak' is not found to be prohibited in the Ordinance and ordered the return of the exhibits to the rightful owner.

The Public Prosecutor being dissatisfied with the order of such discharge of the 5 respondents by the learned Magistrate appeals against the said order.

On 27 April 1993 the appeal by the Public Prosecutor was heard by me and I dismissed the said appeal. I will now state my reason for the dismissal of the appeal.

In his grounds of decision, the learned Magistrate stated that he exercised his discretion to discharge the 5 respondents unconditionally pursuant to s. 173(g) of the Criminal Procedure Code ("the CPC") because the game 'See Goh Lak' was not found to be prohibited by the Ordinance. Neither was

any evidence put before the Court that shows that the said game would turn a place into a common gaming house if played in that place. No money or money's worth of stakes was shown in evidence tendered by the prosecution. As such he found the element of "gaming" not proven. In the circumstances I have to determine what the learned Magistrate meant when he says he discharges the respondents unconditionally.

He came to this conclusion naturally after having considered the evidence contained in the brief facts of the case and other exhibits tendered. It cannot be on account of him considering it "at any previous stage of the case" as spelt out under s. 173(g) of the CPC that is at any stage after plea and in the course of hearing prosecution witnesses but before the conclusion of the prosecution case. See *Chu Chee Peng v. PP* [1973] 2 MLJ 35. The prosecution having tendered the brief facts and the respondents having admitted them without qualification, the prosecution has rested its case. Therefore, the learned Magistrate in this case has fallen into error by quoting s. 173(g) of the CPC as the basis for the exercise of his discretion. Having quoted the paragraph in the section, he ordered that the respondents be discharged unconditionally. The discharge under s. 173(g) cannot amount to an acquittal. See *Chu Chee Peng v. PP supra*.

Under the law as I understand it, the discharge of an accused from a charge can either be a discharge amounting to an acquittal or a discharge not amounting to an acquittal. This is important for a determination as to the future conduct of the prosecution of the 5 respondents on the charge. If the discharge amounts to an acquittal, the respondents cannot any further be prosecuted on the same charge after the order made unless and until the order is set aside by an appellate Court. If the discharge does not amount to an acquittal, the prerogative of the prosecution remains as to whether in the future the respondents would or would not be charged on the same charge.

The brief facts tendered by the prosecution in a case where an accused pleads guilty to a charge constitute all the evidence that is available to the prosecution in support of its case. The fate of the prosecution is dependent on these brief facts of the case. I will give my reason later for saying so. Having heard all the evidence by the prosecution as contained in the brief facts of the case, an accused is entitled to an acquittal if upon such hearing the Court finds that no case against him has been made out which if unrebutted would warrant his conviction. This is what is commonly known as no *prima facie* case being made out. By *prima facie* evidence it means that at the end of the prosecution case there must be found some evidence (not inherently incredible) which, if the Court were to accept it as accurate, would establish each essential element in the alleged offence. If such evidence as respecting any of those essential elements is lacking, then, no case against the accused has been made out which if unrebutted would warrant his conviction within the meaning of s. 173(f) of the CPC. See *Haw Tua Tau v. PP* [1981] 2 MLJ 49 PC. In such a situation the accused is entitled to an acquittal without his defence being called.

In this particular case, by discharging the respondents unconditionally after having heard the evidence of the prosecution as contained in the brief facts of the case and after having examined the exhibits tendered, the learned Magistrate has found that the prosecution has not proved the charge. Therefore, it is one where the prosecution has failed to make out a *prima facie* case. The discharge of the respondents therefore, must amount to an acquittal. Therefore, I would construe the order made by the learned Magistrate discharging the 5 respondents unconditionally as meaning that the respondents in this case were discharged by the learned Magistrate amounting to acquittal notwithstanding what he says that he was acting pursuant to s. 173(g) of the CPC. His error has not occasioned a failure of justice and therefore, is curable by s. 422 of the CPC.

In the course of his submission in this appeal, the learned Deputy though initially contending that the brief facts of the case do not constitute the whole of the evidence by the prosecution, in the end he conceded rightly that these brief facts of the case are indeed evidence for the prosecution in a case where the accused pleads guilty to a charge. There is no doubt that the brief facts of the case are evidence for the prosecution

for, basing on these facts the Court will have to make a decision one way or another at the end of the day, whether the accused is guilty or not guilty on the charge as when they are being admitted unequivocally by the accused, or whether a plea of not guilty be entered instead and proceed to hear the case as where the accused had disputed to the facts so given. If those facts established the case against the accused beyond reasonable doubt then the Court will accept the plea of the accused and proceed to convict him. If on the other hand the facts fall short of proving a *prima facie* case then the accused must be acquitted and discharged on the charge. There is no question of discharging the accused under s. 173(g) of the CPC after the prosecution has tendered all its evidence, as the discharge under s. 173(g) cannot amount to an acquittal. The discharge must be one of acquittal under s. 173(f).

Having decided that the order of the learned Magistrate in this case is one of a discharge amounting to an acquittal, the next issue to consider is whether the learned Magistrate was right in making such an order. He was right firstly by saying that it was incumbent on the prosecution to establish that 'See Goh Lak' was a game forbidden by the Gaming Ordinance 1957 (Cap 138) of Sarawak. Under s. 7(2) of the Ordinance it is an offence for any person gaming in any public place. Gaming means:

(a) the playing of any game in a common gaming house; and
(b) the playing of any game in a public place;
    (i) which is forbidden if played in a common gaming house; and
    (ii) for money or money's worth save under and in accordance with the permit of a competent authority.

Common gaming house means any place kept or used;

(a) for playing any game specified in the First Schedule;
(b) for playing a certain game of chance or mixed chance and skill, not being a game specified in the Second Schedule; or
(c) for playing any other games for money or money's worth; or
(d) for the purpose of a public lottery.

The game of 'See Goh Lak' is not one of those specified in the First Schedule neither is it a game specified in the Second Schedule. The next question to ask is whether it is a game of chance or mixed chance and skill. The brief facts of the case as tendered did not state whether it was so. It merely states "All the accused persons admitted that they were gambling 'See Goh Lak' at the said place which is a public place". The learned Deputy in his submission contends that since the respondents pleaded guilty it is not incumbent upon the prosecution to prove the *modus operandi* of the case and whether it is a game for money or money's worth. I do not think I can agree on that because it is the cardinal principle of criminal law in this country that for the prosecution to succeed it must prove the case against the accused beyond any reasonable doubt. Nothing short of that would suffice. The learned Deputy further contends that the porcelain bowl and three die are sufficient evidence for the purpose. If he meant that to be circumstantial evidence against the respondents to prove that the game played is one of chance or mixed chance and skill or for money or money's worth, that evidence must be such that it points to no other circumstance but the guilt of the accused. Mere presence of those exhibits at the scene or mere possession of them by the respondents cannot be an inference that the game they played is one of chance or mixed chance and skill or for money or money's worth. If he meant to be presumption, the Ordinance does not provide so.

On this fact without more, the Court cannot therefore, assume that the game is one of chance or mixed chance and skill. Neither was there mention made in the facts that it was played for money or money's worth. No chips or money were recovered at the scene where the 5 respondents were arrested. The tendering of one porcelain bowl and three die recovered is one of no assistance to conclude that the game was played for money or money's worth. It is not contemplated that the game is one for the purpose of a public lottery. In the circumstances, the place where the game was played cannot be said to be a common gaming house and the game of 'See Goh Lak' is not one forbidden if played in a gaming house not being a game specified in the First Schedule, neither is it a game of chance or

mixed chance and skill or for money or money's worth. As such the game so played by the 5 respondents is not gaming within the meaning of the Ordinance. Since it is not so, the fact that it is played in a public place will not contravene s. 7(2) of the Ordinance. In the event the 5 respondents cannot be convicted on the charge notwithstanding the fact that they pleaded guilty to it and admitted to the brief facts tendered.

The learned Deputy also submitted that if the respondents had pleaded guilty to something which is not an offence, the learned Magistrate cannot accept the plea but must reject it and set the case down for trial. In the circumstances of this case I do not think that I can agree with this line of submission. The learned Magistrate is obliged to do so only in circumstances under s. 173(c), which is not the case here for the respondents had pleaded guilty unequivocally and did not claim to be tried and fully admitted to the evidence in the brief facts. It is a case which falls squarely within paragraph (f) of s. 173 of the CPC. The alternative left to the learned Magistrate is to discharge the accused amounting to acquittal for lack of evidence by the prosecution which he did in this case.

In the circumstances, the learned Magistrate has come to the correct finding that the element of "gaming" was not proven by the prosecution in its evidence. So the order made though in the form of an unconditional discharge, in the light of what has been said earlier it amounts to a discharge amounting to an acquittal which is proper in the circumstances of the case. I accordingly dismiss the appeal by the Public Prosecutor.

PUBLIC PROSECUTOR

v.

RAJMA BTE ABDULLAH

HIGH COURT, TAWAU
TUAN IAN H.C. CHIN JC
[CRIMINAL TRIAL NO. T3 OF 1989]
12 MAY 1993

CRIMINAL LAW: Dangerous drugs - Accused charged with trafficking in cannabis in contravention of s. 39B(1)(a) & s. 39B(2), Dangerous Drugs Act - Accused arrested with a raffia bag - Whether bag contained 644.50 grammes of cannabis - Possession of cannabis - Whether established that accused in possession of cannabis - Presumptions of knowledge and trafficking - Whether rebutted.

The Accused was charged with trafficking in 644.50 grammes of cannabis in 1987 at the bus station in front of Kampung Singgahmata, Lahad Datu, Sabah, in contravention of s. 39B(1)(a) and punishable under s. 39B(2) of the Dangerous Drugs Act.

The prosecution evidence was that, on 17 April 1987, on receiving information that a woman carrying a raffia bag containing cannabis would be proceeding towards the bus station, Lahad Datu, between 4.00 p.m. and 4.30 p.m., three police constables in plain clothes lay in ambush near the bus station. They saw the Accused walk towards the bus station. They did not see anyone approach the Accused. They arrested the Accused when she was near the station. The Accused let go of a raffia bag she was carrying and tried to run away. The raffia bag was opened in front of the Accused and was found to contain a number of things, including dried vegetable matter. This dried vegetable matter was taken to a chemist. It was found to be 644.50 grammes of cannabis.

The Accused's evidence was that she had come to Sabah from the Philippines when she had received a letter from her nephew Omar that his wife about to give birth. She had entered Sabah illegally. She had been taken to Kampung Singgahmata by the driver of the bus, a man called Munap. She had stayed in Kampung Unta for a month, and had come to Kampung Singgahmata on her way back to the Philippines *via* Semporna when she had been arrested carrying a handbag and a raffia